Mokhtar bin Amin v Mohamed Moktar bin Omar

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO M–02–184 OF 1998
GOPAL SRI RAM, SITI NORMA YAAKOB AND HAIDAR JJCA
8 AUGUST 2001

Civil Procedure *— Judgments and orders — Judgment in default of appearance — Setting aside of — Writ served on defendant personally instead of solicitor — Application of doctrine of res judicata — Whether judgment should be set aside*

By an agreement dated 3 April 1991 the defendant agreed to sell two pieces of land to the plaintiff. The plaintiff had entered a caveat against the titles to the land for the purpose of protecting his interest. Later the defendant terminated the sale agreement and took out proceedings to remove the plaintiff's caveat. The High Court decided that the plaintiff had no caveatable interest in the lands on the footing that the defendant had properly terminated the sale agreement. The plaintiff then served a writ on the defendant for the specific performance of the agreement. No appearance was entered. A certificate of non-appearance was then filed. The plaintiff, acting under O 13 r 6 of the Rules of the High Court 1980 ('the RHC') took out a summons for judgment. Judgment on the summons in default of appearance was subsequently entered against the defendant. The defendant applied to set aside the judgment. It was submitted that the writ ought to have been served on the defendant's solicitors and not on the defendant personally. The judge allowed the defendant's application and held that the judgment was bad because the plaintiff ought to have proceeded under O 19 r 7(1) of the RHC. The plaintiff appealed.

Held, dismissing the appeal:

(1) The non-compliance of procedural requirements should not be treated as invalidating any action or other proceeding or step taken therein unless it occasions a substantial miscarriage of justice (see p 333G).

(2) The plaintiff, despite being aware that the defendant was represented by solicitors proceeded to serve the defendant personally. He knew that the caveat proceedings were on foot. His solicitors ought to have communicated with the defendant's solicitors in the caveat proceedings and found out whether they had instructions to accept service. The defendant's solicitors would in all likelihood have had instructions to accept service of the writ. After all the subject matter of the writ and the caveat proceedings was the same. The plaintiff no doubt did what he did in order to steal a march on the defendant (see p 355F–H).

(3) The judgment in default gave the plaintiff what he was certainly not entitled to have. The issue of the validity of the sale agreement

had already been determined by the High Court in the caveat proceedings. It would appear that prima facie the defendant has a complete answer to the claim for specific relief mounted by the plaintiff in his writ. The parties were bound by the doctrine of res judicata from re-agitating an issue that had already been resolved in earlier proceedings (see pp 335H–336A).

[**Bahasa Malaysia summary**

Melalui satu perjanjian bertarikh 3 April 1991, defendan bersetuju menjual dua bidang tanah kepada plaintif. Plaintif telah mencatat kaveat terhadap hakmilik tanah tersebut dengan tujuan melindungi kepentingannya sendiri. Selepas itu, defendan menamatkan perjanjian jualan tersebut dan memulakan prosiding untuk membatalkan kaveat plaintif tersebut. Mahkamah Tinggi membuat keputusan bahawa plaintif tidak mempunyai kepentingan yang boleh dikaveat dalam tanah tersebut berasaskan hujahan bahawa defendan telah menamatkan perjanjian jualan tersebut mengikut aturan. Plaintif kemudiannya menyampaikan satu writ kepada defendan bagi pelaksanaan spesifik perjanjian tersebut. Tiada kemasukan kehadiran dicatat. Satu perakuan ketidakhadiran kemudiannya difailkan. Plaintif bertindak menurut A 13 k 6 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') dan melaksanakan satu saman penghakiman. Penghakiman ingkar ke atas saman tersebut dicatat menentang defendan. Defendan membuat permohonan menolak penghakiman tersebut. Ia dihujahkan bahawa writ tersebut sepatutnya disampaikan kepada peguam defendan dan bukannya kepada defendan sendiri. Hakim membenarkan permohonan defendan dan memutuskan bahawa penghakiman tersebut rosak kerana plaintif seharusnya mengambil tindakan menurut A 19 k 7(1) KMT. Plaintif merayu.

Diputuskan, menolak rayuan tersebut:

(1) Ketidakpatuhan keperluan prosedur tidak harus dianggap sebagai faktor yang membatalkan apa-apa tindakan atau prosiding atau langkah yang diambil kecuali jika ia merupakan satu salah laksana keadilan (lihat ms 333G).

(2) Plaintif, walaupun sedar bahawa defendan diwakili peguam, tetap menyampaikan writ kepada defendan secara peribadi. Beliau sedar bahawa prosiding kaveat telah dimulakan. Peguam beliau seharusnya berkomunikasi dengan peguam defendan dalam prosiding kaveat dan mendapat tahu sama ada mereka telah diarahkan menerima penyampaian. Peguam defendan berkemungkinan besar telahpun mendapat arahan menerima penyampaian writ tersebut. Lebih-lebih lagi, kandungan writ dan prosiding kaveat adalah sama. Plaintif tidak syak lagi melakukan apa yang telah beliau lakukan untuk mendapatkan satu kelebihan yang tidak adil ke atas defendan (lihat ms 355F–H).

(3) Penghakiman ingkar tersebut memberikan plaintif apa yang beliau memang tidak berhak mendapat. Persoalan keesahan perjanjian jualan tersebut telahpun diputuskan oleh Mahkamah Tinggi dalam prosiding kaveat. Ia kelihatan prima facie bahawa defendan mempunyai jawapan penuh kepada tuntutan relif spesifik yang dipinta plaintif dalam writ beliau. Pihak-pihak diikat oleh doktrin res judicata dari membangkitkan semula satu isu yang telahpun diselesaikan dalam prosiding terdahulu (lihat ms 335H–336A).

Notes

For cases on setting aside of judgment in default of appearance, see 2(2) *Mallal's Digest* (4th Ed, 2001 Reissue) paras 3513–3516.

Cases referred to

Craig v Kanseen [1943] 1 KB 256 (refd)

Jasa Keramat Sdn Bhd & Anor v Monatech (M) Sdn Bhd [1999] 4 MLJ 637 (refd)

London and Clydesdale Estates Ltd v Aberdeen DC [1979] 3 All ER 876 (refd)

R v Immigration Tribunal; ex p Jeyeanthan [1999] 3 All ER 231 (refd)

Stewart Chartering Ltd v C & O Managements SA & Ors [1980] 1 All ER 718 (refd)

Legislation referred to

Rules of the High Court 1980 O 13 r 6, O 19 r 7(1)

Appeal from: Civil Suit No 22–7 of 1997 (High Court, Melaka)

B Thangaraj (*Nizam Bashir* with him) (*Bashir & Co*) for the appellant.

Hilary D'Cruz (*TS Soon* with him) (*Rohani, Soon & Associates*) for the respondent.

Gopal Sri Ram JCA (delivering the judgment of the court):**.** This is a case in which the learned judge of the High Court set aside a judgment entered in default of appearance. The facts of immediate relevance to the entry of the judgment are but brief.

On 8 March 1997, the plaintiff (the appellant before us) purportedly served a writ on the defendant (the respondent in the appeal). No appearance was entered. A certificate of non-appearance was then filed. The plaintiff, acting under O 13 r 6 of the Rules of the High Court 1980 ('the RHC'), took out a summons for judgment. This is because the foot of the writ carried a prayer for specific relief that fell outside those heads of claim in respect of which an ex parte judgment form may be filed in the usual way. In due course, judgment on the summons in default of appearance was entered against the defendant. Later, the defendant applied

to set aside the judgment and the judge acceded to that application. The plaintiff then appealed to us. A

The defendant relied on a number of grounds in support of its application to set aside the judgment in question. Some of these were procedural in nature and some substantive. The learned judge does not appear to have considered the substantive merits of the defendant's case in support of its application. He merely confined himself to procedural points. He held that the judgment was bad because the plaintiff had proceeded under the wrong rule of court. He was of the opinion that the plaintiff ought to have proceeded under O 19 r 7(1) of the RHC instead of O 13 r 6 of the RHC. B

Counsel for the plaintiff has argued that the former rule of court applies only to cases where there has been default in the delivery of a pleading, whereas the latter rule applies to cases where there is default of appearance. I think that the submission of counsel for the plaintiff is correct but it is does not advance his case. There are two principal reasons for this. The first of these is the historical background to the present litigation which I shall discuss later in this judgment. The second, I shall deal with straightaway. C D

At one point in the history of our procedural jurisprudence, our courts treated the observance of the rules of court as a matter of first importance. A perusal of *The Malayan Law Journal* will reveal cases in which an action or other proceeding terminated against a litigant because he or she failed to observe a particular rule of court. And there are judgments of judges of much learning and experience in which one finds statements stressing the importance of due observance of the rules of court. Indeed, the law reports are replete with examples of cases in which an action or other proceeding has failed on procedural grounds. E

Similarly, mandatory and directory provisions, whether in the rules of court or other procedural legislation were interpreted in a straightjacket fashion. So, as a general rule, when a provision said 'shall', it was regarded as being mandatory in effect, whereas if it said, 'may', then it was treated as being merely directory. Non-compliance of the former rendered invalidated proceedings, but non-compliance of the latter did not. No attention whatsoever was paid to the consequences of non-compliance of such provisions. It did not matter, for instance, whether anybody was prejudiced by, or whether any injustice resulted from, the non-compliance in question. F G

The modern approach towards procedural irregularities and the interpretation of what are usually considered to be mandatory or directory provisions is one of greater flexibility than that adopted heretofore. It is exemplified by the following passage in the judgment of Lord Woolf MR in *R v Immigration Tribunal ex parte Jeyeanthan* [1999] 3 All ER 231. It is a case of the first importance. This is what the Master of the Rolls there said (at p 236): H

> An examination of the relevant authorities, the leading textbooks and the numerous authorities to which they refer confirm the limitations of applying a solely mandatory/directory classification (see Wade and Forsyth *Administrative Law* (7th Ed 1994) p 255; Supperstone and Goudie *Judicial* I

> *Review* (2nd Ed 1997) Ch 4 and de Smith, Woolf and Jowell *Judicial Review of Administrative Action* (5th Ed 1995) pp 265–271). Frequently the investigation involves doing no more than deciding the sense in which the word 'shall' has been used as part of a particular procedural requirement. As the word 'shall' is normally inserted to show that something is required to be done, the exercise tends to be an unrewarding one. Much more important is to focus on the consequences of non-compliance. Here the authorities show no constant pattern. This is the result of courts in those cases focusing on the issue of whether or not a requirement is mandatory and ignoring or failing to pay sufficient attention to the issue of the consequences of non-compliance with, in particular, a mandatory requirement.

After referring to the speech of Lord Hailsham of St Marylebone LC in *London and Clydesdale Estates Ltd v Aberdeen DC* [1979] 3 All ER 876, and quoting a passage therefrom, the Master of the Rolls continued as follows:

> Bearing in mind Lord Hailsham LC's helpful guidance I suggest that the right approach is to regard the question of whether a requirement is directory or mandatory as only at most a first step. In the majority of cases there are other questions which have to be asked which are more likely to be of greater assistance than the application of the mandatory/directory test. The questions which are likely to arise are as follows: Is the statutory requirement fulfilled if there has been substantial compliance with the requirement and, if so, has there been substantial compliance in the case in issue even though there has not been strict compliance? (The substantial compliance question). Is the non–compliance capable of being waived, and if so, has it, or can it and should it be waived in this particular case? (The discretionary question.) I treat the grant of an extension of time for compliance as a waiver. If it is not capable of being waived or is not waived then what is the consequence of the non–compliance? (The consequences question.)
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> Which questions arise will depend upon the facts of the case and the nature of the particular requirement. The advantage of focusing on these questions is that they should avoid the unjust and unintended consequences which can flow from an approach solely dependent on dividing requirements into mandatory ones, which oust jurisdiction or directory, which do not. If the result of non-compliance goes to jurisdiction it will be said jurisdiction cannot be conferred where it does not otherwise exist by consent or waiver.

This, I think, is the approach that should be adopted by our courts. In my judgment, the non-compliance of procedural requirements should not be treated as invalidating any action or other proceeding or step taken therein unless it occasions a substantial miscarriage of justice.

The other ground relied on by the defendant in the court below relates to the service of the writ. It is a quasi-procedural point. I think I must explain why I say 'quasi-procedural'. The failure to properly serve the writ or other cause papers upon a defendant amounts to a breach of the fundamental rules of justice. It ordinarily renders an ex parte judgment obtained in reliance upon such service a nullity. The decision in *Craig v Kanseen* [1943] 1 KB 256 illustrates the principle. In that case, the failure to properly serve a summons to proceed under a judgment was held to render an ex parte order made on that summons to be a nullity. Hence, what

is at issue is a substantive right to be notified of the relevant process to enable a party to protect his interests. But the steps leading up to the entry of a judgment or the making of an order may be essentially procedural. So when viewed as a whole, the point is partly substantive and partly procedural. Hence my use of the term 'quasi-procedural'.

The argument in respect of service was that the writ and other cause papers ought not to have been served on the defendant personally. It was said that they ought to have been served on the defendant's solicitors. The learned judge rejected this argument. Counsel for the plaintiff has argued before us that as there is no cross appeal, the defendant is not entitled to reopen this issue in the present appeal. With respect, I do not agree with the conclusion of the learned judge on the point. Neither do I agree with the argument of counsel. Since the question of service is closely connected with the merits of the case, I will give my reasons on this part of the case at the appropriate place in this judgment.

I now turn to consider the history of the present litigation which, in my view, provides a complete answer to the plaintiff's complaints in the instant appeal. The subject matter of the present litigation is an agreement dated 3 April 1991. Under that agreement, the defendant agreed to sell two pieces of land to the plaintiff. It is the specific enforcement of the aforesaid agreement that the plaintiff seeks in his writ in the present action. The plaintiff had entered a caveat against the titles to the land in question for the purpose of protecting his interest. Later, the defendant terminated the sale agreement and took out proceedings to remove the plaintiff's caveat. It was by an originating summons (No 24–151–1995). The summons was heard, and the High Court decided that the plaintiff had no caveatable interest in the lands on the footing that the defendant had properly terminated the sale agreement. It is to be emphasized that both sides were represented by solicitors. The plaintiff had annexed an unsealed copy of the writ in the present action to one of his affidavits delivered in the caveat proceedings. The writ was issued later. Although the plaintiff knew that the defendant was represented by solicitors, his solicitors proceeded to serve the writ and other cause papers on the plaintiff in person. It was pursuant to that service that the plaintiff entered judgment in default.

Based on the foregoing material, it was submitted before us by counsel for the defendant that the entry of the judgment in default amounted to an abuse of process. There is, I think, much force in this argument.

Now, it is true that the rules of court countenance the service of process upon a litigant in person. But it does not follow that in every case where there is due observance of a rule of court, no abuse of process may ensue. A rule of court, like any other provision, may be the subject of abuse. And it is the function and duty of the courts to be ever vigilant against this. An excellent example of a case of the prevention of an abuse of a rule of court is *Stewart Chartering Ltd v C & O Managements SA & Ors* [1980] 1 All ER 718. In that case, the chief clerk in the judgment room had declined to accept a default judgment form in the ordinary way. Robert Goff J however granted the plaintiff in that case leave to enter judgment in default despite

the terms of O 13 r 6(1). He did so in order to prevent an abuse of the court's process.

The court's process may be abused by a litigant in any number of ways. It all depends on the facts and circumstances of each case. In *Jasa Keramat Sdn Bhd & Anor v Monatech (M) Sdn Bhd* [1999] 4 MLJ 637, at p 645, I had occasion to sum up the law on the subject:

> It is trite that a person who has a legitimate grievance may invoke the court's process to obtain redress. But cases may arise where the true purpose for invoking the court's process is something other than to obtain a remedy provided by law. It may be to oppress a defendant. Or it may be to apply pressure upon him which the law regards as illegitimate. Or it may be to merely commence an action and let it hang over the head of the defendant with no intention of bringing it to a conclusion (see *Grovit & Ors v Doctor & Ors* [1997] 2 All ER 417). Or the plaintiff having commenced an action may take steps to discontinue it after the defendant has become dominis litis, thereby preventing the defendant from obtaining vindication through a judgment of the court. In the last instance, the court will refuse to permit discontinuance, or if a notice of discontinuance has been filed, will set it aside and direct the action to proceed (see *Overseas Union Finance Ltd v Lim Joo Chong* [1971] 2 MLJ 124; *Castanho v Brown & Root (UK) Ltd & Anor* [1981] AC 557).
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> A fairly recent decision on the point is that of the English Court of Appeal in *Gilham v Browning & Anor* [1998] 2 All ER 68. It was a case where the defendant's discontinuance of his counterclaim before the county court was held to be an abuse of process. It was there held that whether in a particular case there was an abuse would be a question of fact and degree.
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> Since the circumstances in which the court's process may be abused are varied and numerous, the categories of such cases are therefore not closed.
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> Whether the institution of an action or its continuation or a step taken therein amounts to an abuse of process depends upon particular and individual circumstances. Where an action is found to be an abuse of the court's process, it may be struck out or stayed. If it is too late to do this, the party aggrieved may bring an action based upon the tort of abuse of process.

In the present instance, the plaintiff, despite being aware that the defendant was represented by solicitors, proceeded to serve the defendant personally. He knew that the caveat proceedings were on foot. His solicitors ought to have communicated with the defendant's solicitors in the caveat proceedings and found out whether they had instructions to accept service. There ought to have been no difficulty in doing this. Solicitors do it all the time. I would venture so far to say that the defendant's solicitors would in all likelihood have had instructions to accept service of the writ. After all, the subject matter of the writ and the caveat proceedings were the same. The plaintiff no doubt did what he did in order to steal a march on the defendant.

Further, the judgment in default gave the plaintiff what he was certainly not entitled to have. The issue of the validity of the sale agreement had already been determined by the High Court in the caveat proceedings. It would appear that prima facie, the defendant has a complete answer to the

claim for specific relief mounted by the plaintiff in his writ. The parties were bound by the doctrine of res judicata from reagitating an issue that had already been resolved in earlier proceedings.

So, looking at the case as a whole once again, I think that what happened here was unfair and unjust in more ways than one. The judge came to the conclusion that the default judgment ought to be set aside. I do not agree with all that he has said. But his decision is entirely correct. Any reasonable tribunal similarly circumstanced would have arrived at the same decision. At the end of the day, it is a matter within the discretion of the judge, and I am able to say with confidence that he exercised it correctly.

The appeal is dismissed with costs. The deposit will be paid out to the defendant to account of his taxed costs. The order of the judge is affirmed.

My learned sister Siti Norma Yaakob and my learned brother Haidar JJCA have read this judgment in draft and have expressed their agreement with it.

Appeal dismissed.

Reported by Jafisah Jaafar